IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

[redacted] 79-5506

CURTIS BRINTLEY,

Appellant,

-vs-

STATE OF MICHIGAN,

Appellee.

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SUPREME COURT, U.S.

IN THE MATTER OF PEOPLE OF THE STATE OF MICHIGAN v ANNETTE GAIL ALEXANDER, Appellant, (In re Wayne County Prosecutor v Recorder's Court Judge)

JURISDICTIONAL STATEMENT

AND APPENDIX

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Curtis Brintley and Annette Alexander, Appellants herein, appeal from the final judgment of the Supreme Court of Michigan, dated June 25, 1979 (rehearing denied July 18, 1979), reversing decisions of the Michigan Court of Appeals in each of their cases. Appellants submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that the appeal presents a substantial federal issue warranting plenary consideration.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan in both cases, which were consolidated for argument in that court, is reported at 406 Mich 374, 280 NW2d 793 (1979). The opinions of the Michigan Court of Appeals are reported at 85 Mich App 714, 272 NW2d 532 (1978) (Brintley), and at 85 Mich App 727, 272 NW2d 587 (1978) (Alexander). Copies of these opinions appear in the Appendix, pp. 8-43. The decisions of the trial courts, in both instances the Recorder's Court of the City of Detroit, are unreported.

JURISDICTION

The judgment of the Supreme Court of Michigan, rendered on June 25, 1979, in each case upheld the validity of convictions and sentences under Mich Comp Laws [hereinafter MCLA] §750.227b (Supp 1979-80) in the face of an attack that the statute as applied in each case was repugnant to the Fifth and Fourteenth Amendments of the United States Constitution.

The statute in question, which can be found in West's Mich Comp Laws Ann, vol 38, supp 1979-80, p. 198, provides:

> Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 [carrying concealed weapons] or section 227a [unlawful possession of firearm], is guilty of a felony, and shall be

imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

A timely application for rehearing was filed on July 11, 1979, and denied on July 18, 1979. This denial order appears in the Appendix, p. 43.

A notice of appeal to this Court was timely filed in the Supreme Court of Michigan on September 17, 1979. This appeal is being docketed in this Court within ninety days from the denial of rehearing below. United States v Healy, 376 US 75, 77-80 (1964).

Title 28 USC §1257(2) (1970) confers on the Court jurisdiction for this appeal. The following cases sustain the jurisdiction of this Court. Benton v Maryland, 395 US 784 (1969); North Carolina v Pearce, 395 US 711 (1969); Blockburger v United States, 284 US 299 (1932).

QUESTION PRESENTED

DOES THE DOUBLE JEOPARDY CLAUSE, APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, PROHIBIT SEPARATE CONVICTION AND SENTENCE FOR VIOLATION OF MCLA 750.227b (POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY) AND FOR THE UNDERLYING FELONY (ARMED ROBBERY IN BRINTLEY AND SECOND DEGREE MURDER IN ALEXANDER), WHERE, IN BOTH INSTANCES, ALL THE PROOFS REQUIRED TO ESTABLISH A VIOLATION OF THE UNDERLYING FELONY ARE NECESSARILY REQUIRED FOR PROOF OF VIOLATION OF §750.227b, WHERE THERE IS NO EVIDENCE THAT THE WEAPON HAS BEEN POSSESSED AT A TIME OR PLACE OR FOR ANY OTHER PURPOSE THAN COMMISSION OF THE UNDERLYING FELONY, WHERE THE UNDERLYING FELONY IS SPECIFICALLY CHARGED AS THE FELONY ELEMENT OF THE POSSESSION OF A FIREARM CHARGE AND WHERE (IN BRINTLEY) THE STATE HAS ALREADY AUGMENTED PUNISHMENT FOR ARMED ROBBERIES ABOVE THE PUNISHMENT IMPOSED FOR UNARMED ROBBERIES.

STATEMENT OF THE CASE

On March 18, 1977, Curtis Brinley committed a robbery while in possession of a handgun. At the ensuing non-jury trial, Count I of a two count information alleged that Mr. Brintley

> did assault the above-named Complainant while armed with a dangerous weapon or an article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, to-wit: handgun and did then and there feloniously rob, steal and take from the person of said Complainant, or in his presence, lawful United States Currency, handbag and contents and sundries, also money order and one (1) silver certificate, contrary to Sec. 750.529, MCLA.

Count II alleged that he

> did then and there carry or have possession of a firearm, to-wit: a handgun in the commission or attempt to commit a felony to-wit: Robbery Armed, contrary to MCLA 750.227b.

The trial judge, Honorable Robert L. Evans, first found Mr. Brintley guilty of armed robbery and then found "as a fact, that the instrumentality used in the robbery armed was a gun and that the defendant, Curtis Brintley, possessed the gun during the commission of a felony which is in violation of statute 750.227b." Trial Record, vol. III, 15-16. Mr. Brintley was sentenced to five to ten years for the armed robbery and an additional two years for the felony-firearm offense, the latter sentence to run consecutive to the former.

On appeal to the Michigan Court of Appeals, Mr. Brintley argued that §750.227b violated both the Federal and State [Mich

Const 1963, art 1, §15] Double Jeopardy Clauses. Finding that both the Federal and State Constitutions barred separate conviction and sentence for both a greater and lesser included offense, and that armed robbery was a lesser included offense to the §750.227b charge in this case, that court vacated Mr. Brintley's §750.227b conviction. 85 Mich App at 720-721, 272 NW2d at 585.

On March 17, 1977, Annette Alexander killed her lover during a domestic argument within their shared home. The subsequent Information charged in two counts that Ms. Alexander

> [Count I]
> wilfully, feloniously, maliciously and with a design to effect the death of one LOSLORAN MORRIS WHITLOW did kill and murder the said person with a shotgun, said act not being justifiable or excusable but being without premeditation or deliberation ...

Count II charged that at the same time and place, Ms. Alexander

> did then and there carry or have possession of a firearm, to-wit: shotgun in the commission or attempt to commit a felony to-wit: Murder Second Degree...

The evidence presented at trial established that the shotgun referred to in Count I was the same weapon referred to in Count II and that the second-degree murder referred to in Count II was the same second-degree murder alleged in Count I. There was no evidence offered of possession of the shotgun or any other weapon by Ms. Alexander at a time or place separate from the time and place of the alleged murder, nor was there any evidence of possession of the shotgun or any other weapon by Ms. Alexander for the commission of any offense other than the alleged murder.

As to Count II, Judge Evans, the same judge who had presided at Mr. Brintley's trial, instructed the jury

> Now it should be quite clear to you that the defendant's guilt or innocence of the second Count will depend on whether or not she's convicted of any Count charged in the first offense, guilty of any offense in the first Count.

> I told you that the second degree and manslaughter were both felonies and that if you find that the defendant is guilty under Count I of either second degree murder or manslaughter and if you further find that the murder or manslaughter was committed at a time when she carried or possessed a firearm then that would be sufficient for Count II, for a verdict of guilty under Count II. Trial Record, vol. IV, 55-56.

Apparently rejecting Ms. Alexander's defenses of accident and self-defense, the jury convicted her as charged on both counts.

At the time of sentencing, Judge Evans sua sponte raised the constitutional issue of separate sentencing on the §750.227b count. Trial Record, sentencing vol., 4. After a brief discussion of decisions from other jurisdictions, Judge Evans declined to sentence separately under §750.227b and merged its mandatory two year sentence with the two and one-half to ten years imposed under the murder conviction. See Appendix, pp. 4-7.

The prosecution then sought an order of superintending control in the Michigan Court of Appeals to compel imposition of the mandatory sentence required by §750.227b. Ms. Alexander's Brief in Opposition to Order of Superintending Control raised both the Federal and State Double Jeopardy Clauses as grounds for denying the order. The appellate court found that the federal provision was an independent bar to separate conviction and sentence for second degree murder and violation of §750.227b. 85 Mich App at 737-739, 272 NW2d at 593.

The Supreme Court of Michigan, sua sponte, granted leave to appeal, 403 Mich 832-833 (1978), and issued its four-to-three decision on June 25, 1979. Part I of the opinion found a clear intent of the Michigan legislature that §750.227b create a separate offense. 406 Mich at 398-391, 280 NW2d at 795-796. Part II held that the Federal Double Jeopardy Clause did not substantively limit the creation of separate offenses to be imposed at a single

trial, Id., at 391-394, 280 NW2d at 796-798, and that at any rate the conviction under §750.227b as to both Mr. Brintley and Ms. Alexander, under the prevailing federal test, was not the same offense as the underlying felony. Id., at 394-398, 280 NW2d at 798-799. Part III held that the state constitution did not bar the separate convictions. Id., at 399-402, 280 NWd at 800-801. The convictions were, therefore, reimposed, and Ms. Alexander's case was remanded for sentencing. There were two dissenting opinions among the three dissenting justices, each of which found that the Federal Double Jeopardy Clause barred the conviction and sentence under §750.227b.

THE BASIS FOR JURISDICTION

In the present case the Supreme Court of Michigan necessarily interpreted the Federal Double Jeopardy Clause when it upheld the validity of Appellants' convictions under §750.227b. It was compelled to do so because Appellants had placed this very issue before the lower courts, which in part found the statute invalid on federal grounds; and because in Part III of its own opinion the Michigan Supreme Court found that the State Double Jeopardy Clause, Mich Const 1963, art 1, §15, did not bar the convictions. Thus, it was essential to the state supreme court's analysis and holding that the state statute was not repugnant to the Federal Constitution.

Specifically, the court cited Brown v Ohio, 432 US 161 (1977), for the proposition that the Federal Double Jeopardy Clause does not substantively limit the legislative branch, 406 Mich at 391, 280 NW2d at 796, and that at a single trial a court may impose whatever punishment is authorized by the legislature. Id., at 392, 280 NW2d at 797. The court went on to question whether the test articulated by this Court in Blockburger v United States, 284 US 299 (1932), was constitutional or merely a matter of statutory construction. Id., 406 Mich at 395, 280 NW2d at 798.

The court found, arguendo, that the test was satisfied in the instant cases because the felony-firearm statute, §750.227b, required proof of any felony rather than a specific offense for which either Appellant had been convicted. These findings, based on federal constitutional law, reveal that the court upheld the validity of the state statute, §750.227b, in the face of a meritorious constitutional attack and that jurisdiction to hear this appeal reposes in 28 USC §1257(2).

Should this appeal be deemed improvidently taken, Appellants request that this jurisdictional statement be treated as a petition for a writ of certiorari pursuant to 28 USC §2103.

THE ISSUES ARE SUBSTANTIAL

This appeal is based on US Const, Amend V, applicable to the State of Michigan through US Const, Amend XIV, Benton v Maryland, 395 US 784 (1969), which provides in pertinent part:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

This fundamental safeguard, designed "to protect the liberties of the defendant," Mayers and Yarbrough, Bix Vexari: New Trials and Successive Prosecutions, 74 Harv L Rev 1, 4 (1960) citing 1 Annals of Cong (1789-1791) [1789-1824] at 753, "has descended from days when sanguinary punishments were frequent." Stevens, Sources of the Constitution of the United States (1894) at 230. It stands as a bar against both multiple punishment and multiple prosecution. Cf., e.g., Ex Parte Lange, 85 US (18 Wall) 163 (1874); North Carolina v Pearce, supra.

Because of common law rules against joinder, double punishment originally could result only from multiple trials, and the historical development of the provision has consequently tended to focus much more heavily on the multiple prosecution aspect of the guarantee. As noted, however, in Ex Parte Lange, 85 US at 172:

> [m]anifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.

With the increased incidence today of multi-count prosecutions, and "the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes ... [coupled with] our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution..." Ashe v Swenson, 397 US 436, 452 (1970), (Brennan, J., concurring) protection of the multiple punishment aspect of the guarantee has assumed increasingly greater significance. Cf. Note, Double Jeopardy and the Multiple-Count Indictment, 57 Yale L J 132, 134 (1947). See also Sigler, A History of Double Jeopardy, 7 Am J Legal Hist 283, 289 (1963).

Double jeopardy guarantees today are enforced for the most part by the test formulated in Blockburger, 284 US at 304:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

This rule has been applied in various contexts: single trials (Blockburger); multiple trials (Brown); and multiple offenses arising from one transaction (Gore v United States, 357 US 386 (1958)). The opinion of the Michigan Supreme Court in the instant cases raises substantial questions regarding the scope and content of the Double Jeopardy Clause and the continuing validity of the concomitant Blockburger rule.

I. THE DOUBLE JEOPARDY CLAUSE IS A SUBSTANTIVE LIMITATION ON THE MICHIGAN LEGISLATURE.

The finding of the Michigan Supreme Court that this fundamental protection does not substantively limit the legislature

is an unprecendented and unwarranted abdication of its constitutional responsibility. It is the special function of the judiciary to ensure that no branch of government exceed the parameters of its authority as defined by the Constitution. United States v Nixon, 418 US 683 (1974); Powell v McCormack, 395 US 486, 549 (1969); United States v Carolene Products Co, 304 US 144, 152 (1938).

As Chief Justice Marshall proclaimed in Marbury v Madison, 5 US (1 Cranch) 137, 177, 178 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is.
>
> Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes to the constitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions.

In Jeffers v United States, 432 US 137 (1977), this Court emphasized that the Double Jeopardy Clause in fact limits legislative authority, rejecting the lower court's conclusion that greater and lesser offenses could be separately punished if Congress clearly so intended:

> The critical inquiry is whether Congress intended to punish each statutory violation separately. [citations omitted] In Ianelli v United States, the Court concluded that Congress did intend to punish violations of §1955 separately from §371 conspiracy violations. Since the two offenses were different, there was no need to go further. [citation omitted] If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties. Jeffers, 432 US at 155 (emphasis added)

On close examination of the statutes involved, the Court concluded that Congress had not authorized separate punishment, and there was no need to determine if they were different for double jeopardy purposes.

A similar analysis is found in Simpson v United States, 435 US 6 (1978), where petitioners were convicted in a single trial of aggravated bank robbery, 18 USC §§2113(a) & (d), and using firearms to commit the robbery, 18 USC §924(c). This Court agreed with the lower court that §924(c) was intended to create a separate offense from the underlying felony but that

> this is the beginning and not the end of the analysis necessary to answer the question presented for decision. In Blockburger v United States [citation omitted] this Court set out the test for determining "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." Brown v Ohio, [citation omitted]. Simpson, 435 US at 10-11.

The Blockburger test was not reached, however, because

> [b]efore an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged. Id., at 11-12.

Although the test was again avoided, Simpson clearly reveals that legislative penology, even in a single trial, must prove to be "constitutionally permissible" as defined by Blockburger.

Jeffers and Simpson directly rebut the proposition of the Michigan court that there is no basis for constitutional inquiry when a court finds a legislative intent to create separate offenses. In fact, such a finding is precisely what mandates a constitutional analysis.

The state court's reliance on the observation in Brown, 432 US at 165, that the constitutional guarantee is limited in a single trial to assuring the legislative "authorization" is not exceeded, is also misplaced. Because no criminal statute is self-executing, multiple punishment can only result from the acts of a prosecutor and court. Moreover, because a judicial finding

of a legislative intent to cumulate punishment is a prerequisite to imposition of multiple punishment, it is clear but not significant that the "double jeopardy guarantee serves principally as a restraint on courts and prosecutors." Id., (emphasis added). Additionally, because the Ohio Court of Appeals had defined the joy-riding offense there involved as a lesser included offense of auto theft, which conclusion this Court accepted, the case did not present a question of limitation of legislative power.

II. THE VIOLATION OF §750.227b ALLEGED IN COUNT II OF EACH INFORMATION REQUIRED PROOF OF ALL ELEMENTS CONTAINED IN COUNT I, AND THUS THE OFFENSES WERE THE SAME FOR DOUBLE JEOPARDY PURPOSES.

An inquiry into whether two offenses are the same for double jeopardy purposes must look to the indictment or information brought against the defendant. As stated in Rex v Vandercomb and Abbott, 2 Leach 708, 720, 168 Eng Rep 455, 461 (Crown 1796), there is a double jeopardy bar if "the first indictment were such as the prisoner might have been convicted upon proof of the facts in the second indictment..." Accord, State v Hill, 26 Ariz App 37, 545 P2d 999 (1976); State v Anonymous, 31 Conn Supp 292, 329 A2d 136 (1974); State v Carroll, 189 So2d 273 (Fla Dist Ct App 1966); Kuklis v Commonwealth, 361 Mass 302, 280 NE2d 155 (1972); State v Ballard, 280 NC 479, 186 SE2d 372 (1972).

This approach does not necessitate the abandonment of the statutory inquiry of Blockburger, but it does require an analysis of the statute as embodied in the charge brought against the defendant. Applied in this manner, the Blockburger test affords an actual defendant the full guarantee of the Double Jeopardy Clause while still giving sufficient latitude to legislative penology.

In the present case, Count I in Brintley charged armed

robbery and specified a pistol as the dangerous weapon; Count II alleged a violation of §750.227b and specified armed robbery as the felony and a pistol as the firearm. In Alexander, Count I alleged commission of second-degree murder specifying a shotgun as the murder weapon, and Count II alleged violation of §750.227b specifying second-degree murder as the felony and a shotgun as the firearm. See Appendix, pp. 2-3. The proofs required to sustain a conviction under Count II, in both cases, would necessarily sustain a conviction under Count I, for there was no statutory provision required to prove Count I not also required to prove Count II.

III. CONVICTION UNDER §750.227b REQUIRES PROOF OF A SPECIFIC FELONY.

The narrow holding of the opinion below was that the required proofs of §750.227b and of the defendants' underlying felonies each contained an element that the other did not. The court reasoned that the prosecution was not legally required to prove the specific underlying felony to achieve a conviction under §750.227b, that is, that the state only need prove possession of a firearm plus any felony. The court found no double jeopardy issue because none of the elements of either a murder or armed robbery conviction were necessarily required to prove this threoretical felony.

In Brown, this Court held that greater and lesser included offenses are the "same" for double jeopardy purposes. The Ohio Court of Appeals in that case had defined joy-riding as taking a vehicle without the owner's consent and auto theft as joy-riding with the intent permanently to deprive the true owner of possession. This Court found that because the former did not require proof of any fact not already required by the latter, it was, therefore, a lesser included offense and by definition such offenses are the "same" under Blockburger.

Section 750.227b is also, by definition, a greater offense of the underlying felony. Section 750.227b requires proof of (1) knowing (2) carrying or possession of (3) a firearm (4) during the commission or attempted commission of (5) a felony. The first four elements are constant. The last element, however, is variable, dependent in each case on the underlying felony charged. Where the underlying felony is armed robbery, as in Brintley, the last element is armed robbery; where it is murder, as in Alexander, the last element is murder. In all cases, however, §750.227b requires proof of some one felony as is reflected in the Informations in both Brintley and Alexander and in the jury instructions in Alexander. In each case conviction of the underlying felony was essential to reaching the question of violation of §750.227b. Inasmuch as the respective armed robbery and murder served as elements of the allegations under §750.227b, and establishing the underlying felonies did not require proof of anything not also required for proof of violation of §750.227b, they were lesser included offenses of §750.227b.

The argument that the last element of §750.227b merely requires proof of any felony is unsupportable. No law operates in a vacuum, without reference to the actual defendant or his or her alleged criminal activity. It is for that reason that a specific felony is necessarily enumerated in every felony-firearm Information. Such was the case in both Appellants' cases, and failure to identify a particular felony would have created insurmountable notice problems. The idea that violation of a law analogous to §750.227b can be shown with proof of any felony was appropriately criticized in dissent in State v Treadway, 558 SW2d 651, 654 (1977):

> No additional fact is here required for his conviction of armed criminal action other than that which was proved as an essential element of his conviction for robbery in the first degree. However we may theoretically construct and construe

> these statutes so as to recognize that they might be constitutionally secure, this defendant under these facts in this case is being punished twice for the same offense, namely robbery. His rights should not depend upon a conceivable construction of two statutes, his conviction under one of which was wholly and completely dependent upon his conviction under the other. (emphasis in original)

Harris v Oklahoma, 433 US 682 (1977), is also instructive on this issue. Defendant therein had been convicted of felony murder and then subsequently charged with the underlying robbery with firearms. The second prosecution was held barred by the Double Jeopardy Clause because conviction of the greater crime was necessarily dependent on conviction of the lesser crime. Because the offenses were the "same," they could not be charged separately. Similarly, in each of the present cases, conviction under §750.227b was also necessarily dependent on conviction of the underlying felony. They were, therefore, the same for double jeopardy purposes.

While the Blockburger test looks to the law and not to the proofs, as a constitutional test designed to assure protection of individual liberties, it must look to the law as it functions in a specific trial with an actual defendant. The dangers to our system of law from a narrow reading of the ban against multiple punishment have also been recognized by the courts of many other states. Considering the application of identical or related statutory provisions, courts in Alaska, Indiana, Florida, Georgia, Illinois, Missouri and Tennessee have, on various grounds, refused to uphold cumulative punishment in situations analogous to those at bar. Whitton v State, 479 P2d 302 (Alaska 1970); Williams v State, 226 Ind 668, 366 NE2d 642 (1977); Rusnak v State, 336 So2d 1226 (Fla App 1976); Roberts v State, 228 Ga 298, 185 SE2d 385 (1971); People v Carter, 443 SW2d 176 (Mo 1969); Key v State, 563 SW2d 184 (Tenn 1978); Cole v State, 539 SW2d 46 (Tenn Ct of Crim App 1976).

IV. MR. BRINTLEY'S SENTENCE HAS BEEN TWICE AUGMENTED UNDER TWO STATUTES WHICH ARE THE SAME FOR DOUBLE JEOPARDY PURPOSES.

Mr. Brintley's conviction under §750.227b and MCLA §750.529 (published in West's Mich Comp Laws Ann, vol. 39, p. 404 (1968)) (armed robbery) presents a distinct issue, for two separate sentence enhancements cannot each be imposed if the provision which distinguishes the one enhancement statute from the underlying offense is the "same" as the provision which distinguishes the other from the lesser offense.

Section 750.529 provides in pertinent part

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

This is a sentence enhancement statute to MCLA §750.530 (published in West's Mich Comp Laws Ann, vol. 39, p. 414 (1968)) (unarmed robbery), which provides

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Section 750.529 contains no provision not also within §750.530 except possession of a dangerous weapon or any article fashioned as such. Thus, the Michigan legislature has expressly provided for an increased punishment for robbery committed with a firearm. The only provision of §750.227b which distinguishes it from either §750.529 or §750.530 is possession of a firearm. Proof of this one element also results in an increased punishment. These sepa-

rate punishments resulting from possession of a firearm and possession of a dangerous weapon or article so fashioned are the "same," for every proof of a firearm under §750.227b will invariably prove possession of a dangerous weapon under §750.529. The Double Jeopardy Clause forbids the state from twice increasing Mr. Brintley's sentence for the same offense and requires that his sentencing be either under §750.227b and §750.530 or under §750.529 alone.

V. THE DOUBLE JEOPARDY CLAUSE BARS MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OCCURRING AT ONE PLACE, AT ONE TIME, AND FOR ONE PURPOSE.

Previously useful in protecting the prosecution from the harshness of common law rules requiring dismissal for variance between pleadings and proof, cf. Note, The Federal Bank Robbery Act - The Problem of Separately Punishable Offenses, 18 Wm & Mary L Rev 101, 105 (1976), the Blockburger test has become an historical anomaly widely criticized in the legal literature. Cf. Note, 18 Wm & Mary L Rev, supra; Note, The Same Offense in Oklahoma - Now You See It, Now You Don't, 28 Okla L Rev 131 (1975); Comment, Double Jeopardy: A Protection or An Empty Promise?, 25 U Fla L Rev 838 (1973); Comment, Double Jeopardy: Should "Offense" Be Defined in Terms of Substantive Law?, 38 Mo L Rev 528 (1973); Note: Double Jeopardy and the Multiple-Count Indictment, 57 Yale L J 132 (1947).

As Justice Brennan stressed in his widely cited concurring opinion in Ashe v Swenson, supra, the Blockburger test

> ...does not enforce but virtually annuls the constitutional guarantee. ...Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the "same evidence" test are simply intolerable. Id., at 451-452.

Cf. also Brown, 432 US at 166, n. 6.

Applying Justice Brennan's reasoning, many jurisdictions have applied a less rigid test to resolve double jeopardy issues, even at a single trial. State v Allen, 292 A2d 167 (Me 1972), for example, held that a defendant could not be separately convicted at a single trial for possession and for sale of heroin when the possession and sale were inextricably part of a single transaction:

> Where the only possession of the narcotic drug is that incident to and necessary for the sale thereof, and it does not appear that there was possession before or after and apart from the sale, the State cannot fragment the accused's involvement into separate and distinct acts or transactions to obtain multiple convictions... Id., at 172.

Accord: Thompson v State, 259 Ind 587, 290 NE2d 724 (1972); Fairman v State, 83 Nev 137, 429 P2d 342 (1967); People v Roberts, 40 Cal2d 483, 254 P2d 501 (1953).

The test that emerges from these decisions is equivalent to the "divisible transaction" standard articulated by the Supreme Court of California in Neal v State, 55 Cal2d 11, 9 Cal Rptr 607, 357 P2d 839 (1960). Applying section 654 of their Penal Code, which statute implements the protection against multiple punishment and provides that

> An act or omission which is made punishable in different ways by different provisions of this code may be punishable under either of such provisions, but in no case can it be punished under more than one,

the court observed that "few if any crimes, however, are the result of a single physical act." Thus, "'where a course of conduct violated more than one statute...the problem was whether it comprised a divisible transaction which could be punished under more than one statute under the meaning of section 654.'" 9 Cal Rptr at 611.

The answer to the question was formulated as follows:

> Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. 9 Cal Rptr at 611-612.

In the present cases, all of the conduct ascribed to each Appellant was clearly incident to one objective. There was no evidence that either Mr. Brintley or Ms. Alexander possessed the respective firearm at any time other than the time of the respective underlying offense or for any purpose other than the commission of that offense. When found guilty of the underlying felony, each Appellant was also necessarily found to be in possession of a firearm in the commission of a felony. Neither Mr. Brintley's nor Ms. Alexander's conduct, therefore, was a "divisible transaction," and neither may be convicted and punished for more than one offense. If the Blockburger test, as articulated by this Court, is unable to account for this unity of purpose, then the test does not adequately serve the constitutional rights guaranteed by the Double Jeopardy Clause, and it should, therefore, be modified or replaced.

CONCLUSION

For all the reasons stated above, this Court should

grant plenary consideration of these cases.

Respectfully submitted,

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